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5 In the Matter of

6 THE APPLICATION
7 REGARDING THE
8 CONVERSION AND
9 ACQUISITION OF CONTROL OF
10 PREMERA BLUE CROSS AND
11 ITS AFFILIATES

No. G02-45

OIC STAFF'S RESPONSE TO
MOTION FOR LEAVE TO
INTERVENE OF CONSORTIUM OF
NORTHWEST LAW SCHOOLS

12 On March 17, 2003, the Consortium of Northwest Law Schools ("Consortium") filed
13 its motion for leave to intervene. The Consortium consists of the Lewis & Clark Law School
14 of Portland, Oregon, the School of Law of Seattle University, and the School of Law of the
15 University of Washington, both of Seattle, Washington.¹ The Staff of the Office of Insurance
16 Commissioner ("OIC Staff") urges the Commissioner to deny the Consortium's motion.

17 I. STATUTORY FRAMEWORK

18 Chapters 48.31B and 48.31C, RCW, generally control this proceeding. RCW
19 48.31B.015(4)(b) and 48.31C.030(4) specifically address the rights of interveners. The
20 relevant portions of the provisions are virtually identical and provide in pertinent part:

21 At the hearing, the person filing the statement, the [insurer or health carrier], and any
22 person whose significant interest is determined by the commissioner to be affected
23 may present evidence, examine and cross-examine witnesses, and offer oral and
24 written arguments, and in connection therewith may conduct discovery proceedings in
25 the same manner as is allowed in the superior court of this state.

26 RCW 48.31B.015(4)(b) and 48.31C.030(4). These provisions establish the criteria for the
Commissioner to apply in qualifying parties to participate as interveners in the proceeding.

¹ The representative of the Consortium has apparently not complied with Rule 1(b) of the *Admission to Practice Rules*. The OIC Staff requests that, in the event the Consortium is permitted to participate in this proceeding, its representative be required to promptly comply with the *Admission to Practice Rules* including, if appropriate, Rule 8(b).

1 Specifically, a potential intervener must show that it possesses (1) a significant interest that is
2 (2) affected by the proposed transaction. This determination is solely within the discretion of
3 the Commissioner.

4 Once a party has been qualified to participate under RCW 48.31B.015(4)(b) and
5 48.31C.030(4), the Administrative Procedure Act, chapter 34.05 RCW, (“APA”) establishes
6 additional criteria for application. The statute provides in pertinent part:

7 The presiding officer may grant a petition for intervention at any time, upon
8 determining that the petitioner qualifies as an intervenor under any provision of law
9 and that the intervention sought is in the interests of justice and will not impair the
orderly and prompt conduct of the proceedings.

10 RCW 34.05.443(1). Thus, the petitioner must also show that intervention (3) is in the
11 interests of justice and (4) will not impair the orderly and prompt conduct of the proceeding.
12 In addition, to the extent not inconsistent with the APA, rule 24 of the *Superior Court Rules*
13 applies. RCW 34.05.510(2).

14 **II. GRANT OF THE CONSORTIUM’S MOTION WILL IMPAIR THE ORDERLY** 15 **AND PROMPT CONDUCT OF THE PROCEEDINGS**

16 On October 24, 2002, the Commissioner issued the First Order: Case Management
17 Order in which he established a deadline of November 26, 2002, “by which time persons who
18 wish to participate formally in the proceedings **must** file a petition to do so.” (Emphasis
19 added.) Petitions to intervene were filed on behalf of nineteen organizations and one
20 individual prior to the deadline. The Consortium wholly failed to meet the deadline. The
21 Consortium does not suggest that the late-filing is due to lack of notice of the First Order, but
22 urges that the delay was due to the complex nature of this proceeding, the care required in
23 developing a regional approach to addressing the problems, impacts, solutions and resources
24 in healthcare finance, insurance and delivery, and the complexity of affiliating three law
25 schools and articulating their shared interests. Motion for Leave to Intervene (“Motion”)
26 6:25. Further, the Consortium concedes that permitting it to participate at this late date will

1 result in disruption of these proceedings albeit minimal. Letter to the Honorable Mike
2 Kreidler from Arthur B. LaFrance dated March 13, 2003 (“LaFrance Letter”).

3 The First Order was issued by the Commissioner to aid in regulating the course of
4 these proceedings pursuant to the authority granted to him as presiding officer. First Order
5 3:22 – 4:15. Establishing a deadline for filing petitions for intervention is within that
6 authority. *See* RCW 34.05.425, 434, 437, 446, and 449. Clearly, a deadline for filing such
7 petitions is designed to promote the orderly and prompt conduct of the proceedings within the
8 meaning of RCW 34.05.443(1).

9 The failure of the Consortium to meet the deadline has in itself impaired the orderly
10 and prompt conduct of the proceedings thereby disqualifying the Consortium from being
11 granted intervener status. The motion has resulted in the preparation of this response and has
12 invited at least one more. *See* Letter to Carol Sureau from Robert B. Mitchell dated March
13 20, 2003. A public hearing to consider the motion where, in addition to any written
14 responses, oral argument will be presented may also be a consequence of the Consortium’s
15 motion. *See* LaFrance Letter (reference to oral argument). This is precisely the kind of
16 disruption to the proceedings that the Commissioner intended to avoid by establishing the
17 deadline.

18 The Consortium asserts that its failure to comply with the deadline will not “bar or
19 impede its role as Intervener.” Motion 6:25. This assertion is not helpful because it does not
20 address the conduct of the proceeding as required by RCW 34.05.443(3), but focuses instead
21 on the Consortium’s own interest and position. Although the Consortium has accepted all
22 actions taken by the Commissioner through the date of the filing of its motion (Motion 6:21),
23 it does not take into consideration the activities of the parties, including those of the
24 interveners, during the more than one hundred days since the passing of the deadline. Much
25 has transpired that will not be found on the agency’s web site; some of which the Consortium
26 may find objectionable. The language relating to a proposed protective order is currently in

1 the process of negotiation for presentation to the Commissioner. It is unlikely that the
2 Consortium could accept, sight unseen, all of the provisions negotiated without its
3 participation.

4 The Consortium has not indicated that it intends to accept any limitations on its
5 participation in these proceedings if granted intervenor status. Unlike the University of
6 Washington, the Consortium does not propose to limit its participation in discovery or
7 otherwise. If the Consortium is granted intervenor status, it will further burden these
8 proceedings.

9 As to the explanation submitted to excuse the delay (Motion 6:25), the difficulties
10 articulated by the Consortium are shared by some or all of the various intervenors who
11 managed to timely file their petitions. To the extent the complexity of the proceeding
12 presented an obstacle to the Consortium's meeting the filing deadline, it presented an
13 equivalent impediment to each of the intervenors. The care required in developing a regional
14 approach did not result in delaying the filing of petitions by the National Federation of
15 Community Organizations and Washington Citizen Action, both of which are participating in
16 these proceedings as members of the Premera Watch Coalition and both of which have
17 advocated for a regional approach. Declaration of LeeAnn Hall 5; Declaration of Barbara
18 Flye 3-4. Requiring an additional three months beyond the deadline to get organized is not
19 sufficient to excuse the Consortium's tardiness. Members of the Premera Watch Coalition,
20 originally comprised of eleven organizations that may be fairly characterized as less
21 homogenous than those making up the membership of the Consortium, were able to affiliate
22 in time to meet the filing deadline. The same may be said about the United Way of
23 Anchorage, John Garner and the Anchorage Neighborhood Health Center, all current
24 members of the Alaska Group of intervenors.

25 Permitting the Consortium to participate on the basis of the excuses put forward for
26 failure to timely file its petition would undermine the purpose of the deadline and invite others

1 to attempt to intervene with the inevitable consequence of further disruption of the
2 proceedings.

3 **III. THE CONSORTIUM DOES NOT POSSESS A SIGNIFICANT INTEREST**
4 **AFFECTED BY THE PROPOSED TRANSACTION**

5 The Consortium alleges that each of its member law schools is a provider and
6 purchaser of health insurance and healthcare services for its students, staff and faculty.
7 Motion 2:8. Apparently, none currently offer benefits through Premera. Motion 2:19. There
8 is no allegation that the members ever purchased or provided benefits through Premera. In
9 addition, the Consortium states that each of its members offers a curriculum relating to policy
10 and ethics of healthcare delivery and finance. Motion 3:10 - 3:26.

11 These stated interests are not “significant” within the meaning of the statutory
12 provisions since they are virtually indistinguishable from the interests of the general public.
13 RCW 48.31B.015(4)(b); 48.31C.030(4). A party’s interest must be more than that of a
14 member of the general public. *See, e.g., Fritz v. Gorton*, 8 Wn. App. 658, 660 (Div. 2, 1973);
15 *Ogden Allied Services, Inc. v. Philadelphia*, 1992 WL 223802 (E.D.Pa.).

16 **IV. THE CONSORTIUM HAS NOT SHOWN THAT IT CAN OFFER**
17 **INFORMATION OR EXPERTISE DIFFERENT OR BEYOND THAT OFFERED BY**
18 **PREMERA OR THE OIC STAFF**

19 In setting the bounds of intervention in this proceeding, the Commissioner established
20 three requirements that will be applied to the evidence the interveners will be permitted to
21 discover and offer. Fourth Order 3:12. One requirement is that “the intervener must have
22 established to [the Commissioner’s] satisfaction that it can offer information or expertise
23 different or beyond that being offered by Premera or the OIC Staff.” Fourth Order 3:15.
24 Since the Consortium cannot meet this requirement, it serves no purpose to grant it intervener
25 status.

26 The Consortium asserts two benefits that its participation would confer: (1) it can help
counterbalance the “enormous” legal resources that Premera has marshaled for this

1 proceeding and (2) it has developed a plan for a Northwest Center of Healthcare Law, Policy
2 and Advocacy that would presumably be funded by a portion of Premera's assets. Motion
3 7:13 – 8:11.

4 As to the first benefit, the Consortium pays short shrift to the substantial, albeit not
5 enormous, legal resources marshaled by the OIC Staff and the Alaska Division of Insurance
6 ("ADI"). In addition to the legal staff of both agencies and the assistant attorneys general
7 assigned by the Attorneys General of the respective states to assist the agencies in reviewing
8 the transaction, two law firms that are nationally recognized for their expertise in conversions
9 of Blue Cross Blue Shield organizations from non-profit to for-profit have been retained:
10 Cantilo & Bennett by the OIC Staff and LeBoeuf, Lamb, Greene & MacRae by the ADI. The
11 Consortium has not demonstrated that the offered legal resources will be different or beyond
12 that already being offered by the OIC Staff.

13 The second benefit suggested by the Consortium also does not meet the requirement
14 established by the Commissioner. The plan to establish a center, presumably at one or more
15 of the member law schools, does not appear to be focused on the determination to be made by
16 the Commissioner under chapters 48.31B and 48.31C, RCW, but more on that portion of the
17 review that falls within the purview of the Washington State Attorney General's Office
18 relating to distribution of assets of non-profit corporations. *See* RCW 24.03.230. It does not
19 appear to have any relevance to the valuation of Premera or the allocation of assets between
20 the states of Washington and Alaska. Rather, it may be more appropriate for the Consortium
21 to present its plan as a grant application to any charitable foundation that may be funded by
22 the assets of Premera if the proposed transaction is approved and implemented.

23 **V. RECOMMENDATION REGARDING QUALIFYING FOR PARTICIPATION**

24 The OIC Staff recommends that the Consortium's motion be denied for the reason
25 that, in the view of the OIC Staff, it has failed to demonstrate compliance with the
26 requirements established by RCW 48.31B.015(4)(b), 48.31C.030(4) and 34.05.443(1).

